



DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

RIN 1601-ZA22

Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This Notice rescinds the July 23, 2019 Notice, *Designating Aliens for Expedited Removal*, which expanded to the maximum extent permitted by the Immigration and Nationality Act (INA) the application of expedited removal procedures to noncitizens not already covered by previous designations. The INA expressly authorizes the application of expedited removal procedures to noncitizens “arriving in the United States,” while also authorizing the Secretary of Homeland Security to extend (by designation) such procedures to certain other categories of noncitizens present in the United States. The INA permits the Secretary, in her or his sole and unreviewable discretion, to modify any such designations at any time. By rescinding only the designation of the class of noncitizens covered by the July 23, 2019 Notice, this Notice leaves in effect the prior discretionary designations that have, for over two decades, extended expedited removal to additional categories of noncitizens.

DATES: The rescission of the Notice published at 84 FR 35409 on July 23, 2019, is effective on [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ihsan Gunduz, Office of Strategy, Policy, and Plans, Department of Homeland Security, Washington, DC 20528, (202) 282-9708.

SUPPLEMENTARY INFORMATION:

I. Background

A. DHS Statutory Authority Over Expedited Removal Procedures

Under section 235(b)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1225(b)(1), the Department of Homeland Security (DHS or Department)¹ may remove certain noncitizens² without a hearing before an immigration judge under what are known as “expedited removal” procedures. The INA itself authorizes immigration officers to apply expedited removal procedures to noncitizens “arriving in the United States.” The INA also grants the Secretary authority to apply expedited removal procedures (by designation) to “any or all” noncitizens referred to in the statute as “certain other aliens.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). A noncitizen is within the class of “certain other aliens” if the noncitizen “has not been admitted or paroled into the United States, and . . . has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” INA 235(b)(1)(A)(iii)(II), 8 U.S.C. 1225(b)(1)(A)(iii)(II). Such designation “shall be in the sole and unreviewable discretion” of the Secretary and “may be modified at any time.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii). Those noncitizens “arriving in the United States” and those covered by an expedited removal designation must be determined to be inadmissible under INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C), for fraud or willful misrepresentation, or INA 212(a)(7), 8 U.S.C. 1182(a)(7), for lack of valid immigration documents, to be amenable to expedited removal. INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii).

Previous Secretaries—and, prior to enactment of the HSA, the Attorney General and the Commissioner of the former Immigration and Naturalization Service (INS)—have exercised

¹ Section 235 of the INA continues to refer to the Attorney General, but the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, transferred immigration enforcement authorities to the Secretary of Homeland Security and provided that any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice officials to DHS by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. 6 U.S.C. 557 (codifying HSA sec. 1517); *see also* 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

² For purposes of this Notice, DHS uses the term “noncitizen” to mean any person as defined in section 101(a)(3) of the INA, 8 U.S.C. 1101(a)(3).

their statutory authority to facilitate the application of expedited removal procedures to certain categories of noncitizens. In 1997, the Department of Justice issued regulations implementing the application of expedited removal procedures to “arriving aliens.”³ 62 FR 10312, 10313-14 (Mar. 6, 1997). In 2002, the INS Commissioner designated as amenable to expedited removal noncitizens who arrive in the United States by sea, are not paroled or admitted into the United States, and “have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility under” the Notice. 67 FR 68924 (Nov. 13, 2002). In 2004, the Secretary designated as amenable to expedited removal a category consisting of noncitizens encountered within 100 air miles of the border and within 14 days of their date of entry regardless of the noncitizen’s method of arrival. 69 FR 48877 (Aug. 11, 2004).⁴

In 2019, the Department issued a notice, *Designating Aliens for Expedited Removal*, 84 FR 35409 (July 23, 2019), expanding expedited removal procedures to noncitizens not already covered by previous designations. This new designation expanded the permissible use of expedited removal procedures to all amenable noncitizens not covered under previous designations found anywhere in the United States who have not been admitted or paroled and have not been physically present in the United States continuously for the 2-year period prior to the date of determination of inadmissibility. *See* 84 FR 35413-35414.

The authority to designate certain noncitizens to whom expedited removal procedures may be applied is entrusted by statute to the “sole and unreviewable discretion” of the Secretary. INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii). The statute provides that the Secretary may apply (by designation) expedited removal to any noncitizen “who has not been admitted or paroled into the United States, and who has not affirmatively

³ “Arriving alien” is defined in regulations as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.” 8 CFR 1.2, 1001.1(q).

⁴ *See also* 82 FR 4902, 4904 (Jan. 17, 2017) (eliminating regulatory exceptions in the 2002 and 2004 notices to expedited removal for Cuban nationals encountered in the United States or arriving by sea).

shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility. . . .” INA 235(b)(1)(A)(iii)(II), 8 U.S.C. 1225(b)(1)(A)(iii)(II). Congress provided that such designation “may be modified at any time.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 CFR 235.3(b)(1)(ii).

The Secretary’s “sole and unreviewable” discretion was recently affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, which, along with the D.C. District Court, has exclusive jurisdiction over any challenge to implementation of the expedited removal procedures. INA 242(e)(3), 8 U.S.C. 1252(e)(3). The court of appeals held that the “sole and unreviewable” and “may be modified at any time” language of the statute “could hardly be a more definitive expression of congressional intent to leave the decision about the scope of expedited removal, within statutory bounds, to the Secretary’s independent judgment,” *Make the Road New York v. Wolf*, 962 F.3d 612, 632 (D.C. Cir. 2020), and courts lack any basis to “substantively superintend the Secretary’s designation judgment.” *Id.* at 633. Moreover, the Secretary’s “judgment is committed to agency discretion by law and, under Section 701 of the Administrative Procedure Act (APA), there is no cause of action to evaluate the merits of the Secretary’s judgment under APA standards.” *Id.* Finally, the authority to issue such designations is exempt from notice-and-comment procedures as the Secretary may “expand[] or contract[] the scope of [any] designation” and “is under no duty to consider the views of others in expanding or contracting the scope of the designation.” *Id.* at 634-35. As the Secretary “would be free to ignore the comments,” requiring the Secretary to utilize the notice-and-comment process “would be an empty, yet time-consuming, exercise—all form and no substance.” *Id.* at 635. Accordingly, “there is no cause of action under the [APA] to scrutinize the Secretary’s designation decision so long as it falls within statutory and constitutional bounds.” *Id.* The Secretary is now choosing to exercise his discretionary authority afforded by the statute to rescind the July 2019 Notice and the expanded designation it effectuated.

B. Reasons for Rescinding the July 2019 Notice *Designating Aliens for Expedited Removal*

As noted above, the Secretary's designation authority is "committed to agency discretion by law" and the scope of expedited removal is left to the Secretary's "independent judgment," *id.* at 632-34—that is, it is well within the Secretary's authority to make this determination without offering justification. *See id.* at 633 ("Congress deliberately chose in the Designation Provision to commit such enforcement and resource judgments to the Secretary's 'sole and unreviewable discretion[.]'"). Nevertheless, this section explains the Department's reasoning in rescinding the July 2019 Notice and returning the application of expedited removal to the longstanding parameters that were in place prior to that date.

On February 2, 2021, President Joseph R. Biden, Jr. issued an Executive Order on *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border* ("E.O. on Migration"). *See* E.O. 14010, 86 FR 8267 (Feb. 5, 2021). The E.O. on Migration directs the Secretary of Homeland Security to promptly review and consider whether to modify, revoke, or rescind the July 2019 Notice regarding the geographic scope of expedited removal pursuant to INA section 235(b)(1), 8 U.S.C. 1225(b)(1), consistent with applicable law. It also directed that the review shall consider our legal and humanitarian obligations, constitutional principles of due process and other applicable law, enforcement resources, the public interest, and any other factors consistent with this order that the Secretary deems appropriate. Additionally, if the Secretary determines that modifying, revoking, or rescinding the designation is appropriate, it directs the Secretary to do so through publication in the *Federal Register*. *See* 85 FR 8270-8271.

As directed by the E.O. on Migration, the Department conducted its review of the July 2019 Notice. The Secretary determined that maintaining the authority to apply expedited removal to the maximum extent provided by statute is inadvisable at this time due to the Department's need to prioritize the use of its limited enforcement resources, as well as the

operational complexities of implementing the July 2019 Notice. The Department believes that expedited removal is best focused as a border enforcement tool on recent entrants encountered in close proximity to the border or its functional equivalent (e.g., air and land ports of entry), rather than on individuals apprehended throughout the United States without geographical limitation, who may have developed significant ties to the community. This is consistent with prior determinations made by DHS and INS. *See, e.g.*, 69 FR 48879 (“In the interests of focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border, this notice does not implement the full nationwide expedited removal authority available It is anticipated under this designation that expedited removal will be employed against those aliens who are apprehended immediately proximate to the land border and have negligible ties or equities in the U.S.”); 62 FR 10313 (“The Department [of Justice] acknowledges that application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage[.]”).

The Department notes the high number of encounters along the Southwest land border, and the continually shifting demographic characteristics of noncitizens encountered. The high number of apprehensions overall require significantly more DHS resources to process and adjudicate. A substantial number of border encounters are now children and family units, and the overall volume of children and family unit encounters has been increasing, representing a major break from historical trends, with substantial repercussions for immigration enforcement. Humanitarian concerns and legal protections make processing children and family units much more complex and resource-intensive than processing single adults. In addition, as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have limited facilities set aside for women or family units (or children, in the case of CBP), both are dealing with much more diverse demographic profiles than their infrastructures were designed to manage.

Given the operational constraints associated with current encounter trends and the Department's limited enforcement resources, the Secretary believes that expedited removal is best applied at or along the border or its functional equivalent (e.g., air and land ports of entry) and for noncitizens who entered the United States recently, consistent with longstanding practice and in furtherance of border security aims. Retaining the expanded expedited removal authority would require time- and fact-intensive training for all current officers, agents, and supervisors that would detract from multiple new initiatives presently being introduced to the workforce to better serve enforcement priority mission areas. Additionally, as the use of expanded expedited removal would involve complex new challenges for the ICE workforce, it would come with increased risk of otherwise avoidable legal challenges to the agency's enforcement actions. The fact that the expanded expedited removal authority was used so rarely by ICE officers during the approximately one year that it was available to them reflects the operational complexities and limited utility that it presented in practice.

Because the July 2019 Notice did not rescind or modify any earlier designation, its rescission has the effect of restoring the limitations on the applicability of expedited removal procedures that applied before the date of its adoption (July 23, 2019). The Secretary reserves his prerogative to determine in the future whether and to what extent new designations or further discretionary modifications of designations under INA 235(b)(1)(A)(iii), 8 U.S.C.

1225(b)(1)(A)(iii), and 8 CFR 235.3(b)(1)(ii) may be undertaken.

C. This Rescission Is Immediately Effective

This Rescission is effective without prior notice and comment or a delayed effective date. Congress explicitly authorized the Secretary to designate categories of noncitizens to whom expedited removal procedures may be applied. It also made clear that “[s]uch designation shall be in the sole and unreviewable discretion of the [Secretary] and may be modified at any time.” INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I). Therefore, the Secretary's designation, within statutory bounds, is “committed to agency discretion by law and . . . there is no cause of

action to evaluate the merits of the Secretary’s judgment under APA standards.” *Make the Road*, 962 F.3d at 633-34. Furthermore, as the D.C. Circuit held, based on the statutory language allowing for modification of the designation “at any time” and in his “sole and unreviewable discretion,” the Department does not have to undertake the notice-and-comment rulemaking process. *Id.* at 635.

In keeping with the practice followed in announcing previous designations, consistent with the statute at INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I) and implementing regulations at 8 CFR 235.3(b)(1)(ii), and for the reasons explained above, this designation is effective without prior notice and comment or a delayed effective date. *See, e.g.*, 67 FR 68925; 69 FR 48880; 82 FR 4769; 82 FR 4902; 84 FR 35413. As discussed above, the rulemaking procedures of the APA do not apply to this Notice and the expansion or contraction of a designation may be made “at any time.” *Make the Road*, 962 F.3d at 634-35 (internal quotations omitted).

II. Rescission of the Notice of July 23, 2019, *Designating Aliens for Expedited Removal*

Pursuant to INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii), and 8 CFR 235.3(b)(1)(ii), I order, in my sole and unreviewable discretion, as follows:

(1) The Notice titled *Designating Aliens for Expedited Removal*, 84 FR 35409 (July 23, 2019), is hereby rescinded, effective immediately.

(2) With the exception of the July 23, 2019 Notice rescinded above, this Rescission Notice does not supersede, abrogate, amend, or modify any of the previous designations under INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). *See* 82 FR 4902 (Jan. 17, 2017); 69 FR 48877 (Aug. 11, 2004); 67 FR 68924 (Nov. 13, 2002). They shall remain in full force and effect in accordance with their respective terms.

Signed at Washington, DC.

Alejandro N. Mayorkas,
Secretary, Department of Homeland Security.

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